# APPELLATE CIVIL.

*Before Mr. Justice Mitter and Mr. Justice Agnew.*

BENI RAM BHUTT AND OTHERS (PLAINTIFFS) *v.* RAM LAL DHUKRI AND OTHERS (DEFENDANTS.)* 1886 *March* 30.

*Minor, Suit by—Minority, Objection on the ground of—Remand—Rejection of plaint—Civil Procedure Code, ss.* 2, 53, 54, 422—*Decree, What it includes.*

Section 442 of the Civil Procedure Code refers to a case where the plaint on the face of it appears to have been filed by a person who was a minor.

Where in a suit the plaintiffs described themselves as adults, and on the objection of the defendants an issue was raised and inquired into on the question of age:

*Held*, that the order passed under the circumstances, although it professed to have been made under s. 442 of the Procedure Code, must be treated as one rejecting the plaint or dismissing the suit, on the ground that the suit was instituted by persons who were established on the evidence to be minors, and was appealable as a decree within the meaning of s. 2 of the Code.

The words, "rejecting the plaint," in s. 2, are not limited to the cases provided for in ss. 53, 54.

*Held*, also, that the defendant, not having taken an objection to the suit on the ground of the minority of the plaintiffs, whilst it was pending in appeal to the High Court, were precluded from raising it on remand.

THIS suit was instituted in the month of June 1880 by the four plaintiffs who are brothers, *viz.*, Beni Ram Bhutt, Krishna Ram Bhutt, Hurry Ram Bhutt and Mohun Ram Bhutt. The first two plaintiffs brought the suit on their own behalf as adults, and the last two plaintiffs, who were said to be minors, by their next friend, their eldest brother Beni Ram Bhutt. The written statements in the suit were filed in September 1880, and in these written statements it was stated that all the plaintiffs were minors. In the month of March 1881 the issues were framed, and the second issue was "whether the plaintiffs Nos. 1 and 2 were majors or not." The suit was ultimately dismissed by the lower Court on the 20th of May 1881 on the

*Appeal from Original Decree No. 277 of 1884, against the decree of Baboo Kali Prosunno Mookerjee, Rai Bahadoor, Subordinate Judge of Gya, dated the 6th of August 1884.

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ground that no evidence was given by the plaintiffs in the case. An appeal was preferred against that judgment, and on the 30th April 1883 the High Court remanded the case in order to allow the plaintiffs an opportunity of adducing evidence. On the case going back an application was made by the plaintiff No. 1 to be allowed to represent the minor plaintiffs as their next friend. That application was granted by an order dated 30th July 1884. Then evidence was taken, and after the plaintiffs had closed their case, the Subordinate Judge decided the suit upon the ground that all the four plaintiffs were minors at the time of its institution, and upon that ground directed the plaint to be taken off the file under s. 442 of the Code of Civil Procedure, awarding a decree for the costs incurred by the defendants against one Gopal Lal, who was the mookhtar, who appointed the vakeel by whom the plaint was filed.

Against this order an appeal was filed to the High Court.

Baboo *Saligram Singh* and Baboo *Jogendra Chunder Ghose* for the appellants.

Mr. *Twidale* for the respondents.

The judgment of the Court (MITTER and AGNEW, JJ.) was as follows :—

(Their Lordships, after stating the facts as above, proceeded) :— It is contended on behalf of the respondents that no appeal lies against an order passed under s. 442, but we are of opinion that although the Subordinate Judge says that the order in question was passed by him under s. 442, it was not really an order under that section. Section 442 is to the following effect: "If a plaint be filed by or on behalf of a minor without a next friend the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented. Notice of such application shall be given to such person by the defendant; and the Court, after hearing his objections, if any, may make such order in the matter as it thinks fit." That section refers to a case where, on the face of the plaint, it appears that it was filed by a person who was a minor. It does not contemplate any enquiry into the question of minority as in this case, where it is brought by persons professing them-

selves to be adults, and where the defendant objects to the suit on the ground that they are not adults but minors, and where, upon these conflicting allegations, an issue is raised for trial. In a case like this the order of the Court, if it finds that the defendants' allegation is correct, is not passed under s. 442. A case of this nature is not expressly provided for in the Procedure Code, but there are decided cases which show that in a case of this nature the former practice which, not being abrogated by the present Code, must be considered to be in force, was to suspend all proceedings and to allow sufficient time to enable the minor to have himself properly represented in the suit by a next friend; but be that as it may, the order which has been passed in this case does not appear to us to be an order under s. 442. It is therefore not necessary for us to decide the question whether an order under s. 442 is appealable. The present order, although it professes to have been passed under s. 442, must be an order rejecting the plaint or dismissing the suit on the ground that the suit was instituted by persons who were established on the evidence to be minors. Whether considered as an order rejecting the plaint or dismissing the suit, it would be appealable because it comes within the meaning of the word *decree* as given in s. 2 of the Civil Procedure Code, and there is no reason why the words *rejecting the plaint* used in s. 2 should be limited to the cases provided for in ss. 53 and 54. We are of opinion that the preliminary objection taken before us must be over-ruled. Then, as regards the merits of the appeal, it seems to us that, even if we were inclined to agree with the lower Court that all the plaintiffs were minors at the time when the suit was instituted, still we should have held that the lower Court was not justified in dismissing the suit upon that ground. We have already referred to the practice that prevailed before the new Code of Procedure was passed, and we have already said that that practice has not been abrogated by any provision in the Civil Procedure Code. But in this case, taking the finding of the lower Court to be correct, yet, at the time when the trial took place, the plaintiff No. 1 was admittedly of age, and therefore it would have been unnecessary to suspend proceedings in order to allow him to appear by a next

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friend. In fact, being an adult, he was competent to proceed with the suit himself. Furthermore, we have referred already to the order of the 30th of July 1884, by which the plaintiff No. 1 was appointed next friend to the two minor plaintiffs. At that time he was of age, and we are at a loss to understand how, in the face of that order, the lower Court dismissed the whole suit upon the ground that all the four plaintiffs were minors at the time of the institution of the suit. So far as the plaintiffs Nos. 3 and 4, who were then admittedly minors, and who are now admittedly minors, are concerned, the suit was not liable to be dismissed, because they were represented by their eldest brother and next friend appointed by an order of the Court. We further find that, when the appeal was preferred to this Court by the plaintiffs, and on that appeal the Court directed the lower Court to allow them to adduce their evidence, no objection was taken by the respondents on the score of their minority. That being so, we are of opinion that they were precluded from relying upon that objection in the lower Court when the case was remanded to that Court for trial. If it were necessary to express any opinion upon the evidence given in the Court below, we should be inclined to hold that the conclusion to which the lower Court has come upon that evidence is not correct. The mother of the plaintiffs deposes that the plaintiff No. 1 was, at the time her deposition was taken, 23 years of age, and the Judge rejects this evidence, although it was supported by a horoscope filed and proved, upon the ground that it was the uncorroborated testimony of a single witness. He says, referring to the evidence of the mother: "The evidence of Munni Bohu, the mother of the plaintiffs, would indeed show the age of these persons to be more than what the other witnesses have stated; but the uncorroborated testimony of a single witness, especially when rebutted by the evidence on the same side, cannot be relied upon. Munni Bohu indeed is the mother of the plaintiff, but that is no reason why her testimony should be relied upon, when it is contradicted by the other evidence adduced on the plaintiffs' side." The other evidence to which the Subordinate Judge refers is merely the loose statements of some witnesses as to the ages of the

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respective plaintiffs, and from their testimony it is quite clear that they could not speak with any degree of precision as to the ages of the plaintiffs. It is a matter of some surprise to find the Subordinate Judge saying that, because Munni Bohu is the mother of the plaintiffs, her testimony is not to be relied upon. A mother's evidence would be the best evidence upon the question of the age of her sons, especially when that testimony is supported by the evidence of a horoscope which has been produced and proved by a competent witness. The Subordinate Judge should have accepted that evidence as fully trustworthy.

Upon these grounds we think that the decision of the lower Court is erroneous. We set it aside, and as the defendants' evidence has not been taken, the case will be remanded to the lower Court.

Costs will abide the result.

K. M. C. *Case remanded.*

## APPEAL FROM ORIGINAL CIVIL.

*Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Wilson.*

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*February 27.*

J. N. MALCHUS (PLAINTIFF) *v.* BROUGHTON AND ANOTHER (DEFENDANTS).*

*Will, Construction of—Charitable gift—Cy près, Doctrine of—Lapse of Legacy—Costs.*

Under the will of *A*, who appointed the Administrator-General of Bengal his executor, *B* had a life interest in the residue of the testator's estate. *B*, brought a suit against the Administrator-General to have it declared that a pecuniary legacy, given under the will, had lapsed and fallen into the residue. Prior to the hearing it was agreed between *B* and the Administrator-General that the costs of the suit should come out of the testator's estate; this agreement was embodied in a consent order obtained on the application of the plaintiff. The suit was dismissed, and this decision was affirmed on appeal.

On the question of costs, *held* that the estate of the testator not being before the Court, the agreement as to costs could not be carried out, and that the plaintiff must pay the costs of all parties to the suit.

APPEAL from the decree of Pigot, J., dated the 8th June 1885.

The suit was one brought by the plaintiff, who had a life interest in the residue of the testator's estate, against the Administrator-

* Appeal No. 26 of 1885, against the decree of Mr. Justice Pigot, dated the 8th of June 1885.